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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 573

HAROLD C. BOOTH and HENRY J. McCARTHY,
PETITIONERS,

v.

VARIAN ASSOCIATES,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT, VARIAN ASSOCIATES, IN OPPOSITION

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QUESTIONS PRESENTED

The Respondent is dissatisfied with Petitioners' statement of the questions presented for review and says that the questions should be stated as follows:

1. Whether, upon the particular facts of this case, for purposes of § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 p. (b) (which provides in substance that a company with a registered equity security

may recapture any profit realized by a director from any purchase and sale of the company's stock within any period of less than six months) the "purchase" here occurred (a) in 1959 when the parties entered into a contract entitled "Agreement for Exchange of Stock" under the terms of which the number of shares and price per share to be received by each director on the exchange were not specified, but were to depend on the closing market quotation of the stock on the day before the exchange, which was to be nearly three and one-half years later, and the increase, if any, in the retained earnings of the corporation whose stock was being surrendered in the exchange, or (b) in 1962 when the exchange took place and when the number of shares and the price per share thereof to be received by the directors were for the first time established on the basis of the previous day's closing market quotation and on the increase in the retained earnings of the other corporation.

2. Whether, upon the particular facts of this case involving an Agreement for future exchange of securities, that Agreement itself constitutes the type of debt referred to in the exemption provided in § 16(b) for securities "acquired in good faith in connection with a debt previously contracted."

STATEMENT OF THE CASE

The Respondent is dissatisfied with the Petitioners' statement of the case in two respects, as follows:

1. At page 4 of the Petition it is stated that "The Contract of February 26, 1959, was a firm commitment on both sides, . . . " This is an argumentative conclusion on a fact issue which was basic to the case. A more impartial statement on this point is as stated by the court below (Pet. pp. 27-28) "Although the agreement of January 1959 [as amended February 26, 1959]

firmly committed both parties to an eventual exchange of shares, it by no means constituted a completed arrangement. Not only did it leave the purchase price unfixed, it provided that the price should be fixed at the closing market quotation on the day prior to the closing, nearly three and one-half years later, . . ."

2. At page 5 of the Petition there appears a paragraph entitled "The Holding Below." This paragraph is an inaccurate and incomplete summary of the decision of the court below, to which the Respondent respectfully refers (Pet. pp. 23-30).

ARGUMENT

The Petition does not present any special or important reasons, as indicated in Rule 19 of the Revised Rules of this Court, for the exercise by this Court of its sound judicial discretion in favor of a review of this case on a writ of certiorari.

The Agreement for Exchange of Stock was an executory agreement for the acquisition of a number of shares of stock to be fixed on the basis of the market value of the stock and the retained earnings of the corporation whose stock was to be exchanged therefor, all as of a date some three and one-half years later. In approaching the question whether that Agreement was, as the Petitioners contend, a "purchase" within the meaning of § 16(b) of the Securities Exchange Act of 1934 at the time it was executed, the court below adopted and applied the "possibility of abuse" test developed by the Second Circuit in decisions which the Petitioners cite (Pet. pp. 5-7). Upon analysis, it appears that the Petitioners' argument for review of the decision below rests largely upon an attempt to equate, for the purposes of this test of a "purchase", the above described agreement with an executory agreement or exercised option for the purchase of shares in which the

number and price are specified and fixed in the agreement or the option itself.

The court below took the view (Pet. p. 28) that the agreement in this case leaving the purchase price per share (and therefore the number of shares to be purchased) unfixed until the day before the closing date, nearly three and one-half years later, had the effect of "making the purchase under the contract as much as possible *like a market purchase at the time of closing*", and that "Besides sheltering appellants from the possible advantages or disadvantages of a fluctuating market, this would appear to have made speculation against the contract not only risky but, as appellee contends, virtually impossible." The correctness of the court's appraisal of the practical likelihood that the somewhat unusual contract here involved would or would not, on the date of its execution, make possible the abuses to which the statute is directed does not, we submit, present a question deserving of review by this Court.

We submit that the following brief analysis of the five reasons advanced by the Petitioners for the granting of their Petition supports the Respondent's position as stated above.

First Ground.

The Petitioners contend (Pet. pp. 5-13) that the decision below is in conflict, at least in principle, with a line of cases in the Second Circuit which has formulated a generally accepted test for fixing the date of "purchase" of stock by insiders for the purposes of § 16(b). We submit that there is no such conflict.

The Petitioners state (Pet. pp. 6-7) that the Second Circuit test is as follows:

> "The underlying principle which has gradually emerged, in search for a construction 'in light of the statutory purpose' is that 'the transaction is a "pur-

> chase" if in any way it lends itself to the accomplishment of what the statute is designed to prevent.' "

They further state (Pet. p. 7) that this test has consistently been applied in determining the date of "purchase". The court below clearly adopted and followed this legal principle, saying (Pet. p. 27), in language strikingly like that of the Petitioners:

> "The question thus becomes one of balancing the respective advantages and disadvantages of each contended for 'purchase' date and determining which one, if held to be the date of purchase, would be more likely to lend itself to the abuses the statute was designed to protect against."

In asserting that there is conflict between the decision below and the decisions of the Second Circuit, the Petitioners stress language in the latter decisions to the effect that the crucial question is when the insider "incurred an irrevocable liability to take and pay for the stock" (Pet. pp. 5, 12). They ignore the fact, however, that in those cases the element of indefiniteness as to the number of shares to be acquired and the purchase price of the shares, which is the nub of the present case, was wholly absent. The significance of this fact is well illustrated by the decision of the Second Circuit in *Blau* v. *Ogsbury,* 210 F.2d 426, on which the Petitioners lean so heavily. There the court fixed the time when Ogsbury mailed his notice of election to take a fixed number of shares at a fixed price pursuant to an option as being the time of the purchase for the purposes of § 16(b), saying that "Thereafter for all speculative purposes he owned the stock" (Pet. p. 36). But in that case the purchase price was specified by the terms of the option, and the number of shares to be purchased was stated in the notice of election. Further elaborating the reasons for its decision, the court said (Pet. p. 37):

> "The reasoning behind our earlier rulings is sound. It matters not to the speculator who has title or possession or who can vote the stock or receive dividends. What he needs is firm assurance that a *fixed* quantity can be acquired or disposed of at a *fixed* price; and his commitments are on that basis. And speculation, actual or potential, is the only vice within the purview of § 16(b)." (Emphasis added.)

The statement quoted above as to the speculator's need for firm assurance that a fixed quantity of stock can be acquired or disposed of at a fixed price per share plainly appears as the *ratio decidendi* of the *Blau* case. The Petitioners characterize as "irrelevant" and as a "formula element" (Pet. p. 8) the fact that in the instant case the fixing of the price per share and the number of shares was not to occur until the date of the exchange over three years later, and they ignore the importance attributed by the Second Circuit and by the court below to the date when such a "fixing" occurred in determining the date of the "purchase" for the purposes of § 16(b). This is apparent from the statement in the Petition (p. 6) that the *Blau* case is precisely in point "except for the formula element in the contract here." We submit, however, that the so-called "formula element" plainly distinguishes the two cases.

Second Ground.

The Petitioners contend (Pet. pp. 13-15) that the decision below is in conflict with the administrative construction in closely analogous situations.

What was said above under "First Ground" relative to the indefiniteness of the number of shares to be purchased and the price per share in our case, applies with equal force to the Petitioners' argument on this Second Ground. There is nothing in the administrative rulings cited by the Petitioners to suggest that they were concerned with anything other than the usual situation in

which the "firm commitment" is to take a specified number of shares at a specified price.

Third Ground.

The Petitioners contend (Pet. pp. 15-18) that the court below has erroneously decided an important question of federal law which should be settled by this Court.

The truth is that the decision below involved only a determination, based on the terms and provisions of the Exchange Agreement that was before the court, as to which of the two contended for "purchase" dates would be more likely to lend itself to the abuses the statute was designed to protect against. That approach was squarely in conformity with the pronouncement of this Court in *S.E.C.* v. *Ralston Purina Co.*, 346 U.S. 119, 124-125 (1953).

We submit that the decision below is correct and that, as it depended on the particular facts of this case, it is of no general interest or importance.

Fourth Ground.

The Petitioners urge (Pet. pp. 18-20) that the alleged conflict between the decision below and the cases elsewhere, principally in the Second Circuit, is rendered more portentous because of the "forum-shopping" possibilities inherent in § 27 of the Securities Exchange Act.

If, as we contend, there is no such conflict as the Petitioners allege, this suggestion is clearly without merit.

Fifth Ground.

Finally, the Petitioners suggest, apparently with some hesitancy (Pet. pp. 20-22), that, even assuming there was no "purchase" until the closing date in June, 1962, in any event the "purchase" of the stock by the Petitioners at that time comes within the exemption clause of § 16(b) as being an acquisition "in good faith

in connection with a debt previously contracted" and that the construction placed upon this exemption clause by the court below "does clash in important respects with *Rheem Mfg. Co.* v. *Rheem*, 295 F.2d 473 (9th Cir.), the case in which the exemption has received its only reasonably thorough consideration thus far." (Pet. p. 20).

It is respectfully submitted that there is no such "clash". The court below concurred with the District Court's giving "scant credence" (Pet. p. 30) to the argument that the very contract under which the Petitioners were obligated to accept the stock was at the same time "a debt previously contracted." In its determination that the exemption referred to independent and matured obligations, the court below cited with approval the decision in the *Rheem Mfg. Co.* case, *supra*, where the Ninth Circuit at page 476 said, "Here there was an obligation to pay a fixed sum certainly and at all events, existing prior to and apart from the settlement of the obligation by the transfer of stock, which we are persuaded determines the existence of 'a debt previously contracted' within the meaning of the statute."

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

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